

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2008 MSPB 204

Docket No. CH-0752-07-0675-I-1

**Lori E. Heath,
Appellant,**

v.

**Department of Agriculture,
Agency.**

August 21, 2008

John Fabian, Esquire, Minneapolis, Minnesota, for the appellant.

Sandra J. Fortson, Esquire, Beltsville, Maryland, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The agency has filed a petition for review (PFR) of the February 7, 2008 initial decision (ID) that reversed the agency's action removing the appellant. For the reasons set forth below, we DISMISS the agency's PFR as untimely filed with no good cause shown for the delay in filing.

BACKGROUND

¶2 The agency removed the appellant from her position of Civilian Pay Technician based on a charge of improper conduct, absence without leave. Initial Appeal File (IAF), Tab 8, Subtabs 4a, 4b, 4c, 4h. The appellant timely appealed her removal to the Board and alleged that the agency committed disability

discrimination in removing her. IAF, Tab 1. The administrative judge (AJ) found that the agency failed to prove its charge and also sustained the appellant's defense of disability discrimination. ID at 5, 8. Accordingly, the AJ reversed the agency's removal action, ordered the appellant reinstated, and ordered interim relief. *Id.* at 8-9. The ID was issued on February 7, 2008, and informed the parties that, absent a PFR, the ID would become final on March 13, 2008. *Id.* at 1, 10.

¶3 On March 5, 2008, the agency requested an extension of time to file a PFR and the Board granted that request, setting a new deadline of April 4, 2008, for the filing of a PFR. PFR File, Tabs 1, 2. On April 7, 2008, the agency filed a further request for an extension of time, which the Clerk of the Board denied because it was untimely filed. PFR File, Tabs 3, 5. The agency then filed its PFR on April 27, 2008, 23 days late, requesting that the Board waive its time limit. PFR File, Tab 6. The appellant responded in opposition to the agency's request for waiver of the Board's time limit. PFR File, Tabs 7, 19. The appellant also filed a motion to dismiss the agency's PFR, alleging that it has failed to comply with the ID's interim relief order. PFR File, Tabs 15, 19. The agency has filed an opposition to the appellant's motion to dismiss. PFR File, Tabs 16-18.

ANALYSIS

¶4 A PFR must be filed within 35 days after the date that the ID was issued or, if the ID was received more than 5 days after it was issued, within 30 days after the date that it was received. 5 C.F.R. § 1201.114(d). The Board will waive the filing deadline for a PFR only upon a showing of good cause for the delay in filing. 5 C.F.R. § 1201.114(f). To establish good cause for an untimely filing, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). To determine whether a party has shown good

cause, the Board will consider the length of the delay, the reasonableness of the excuse and the showing of due diligence, whether the party is proceeding pro se, and whether the party has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to her inability to timely file a petition. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶5 The ID set forth the proper procedure, including the applicable time limits, for the parties to pursue Board review of the ID. ID at 10-12. Having timely requested and been granted an extension of time until April 4, the agency untimely requested a further extension on April 7, which the Clerk of the Board denied. *See* 5 C.F.R. § 1201.114(e). The agency's representative asserts that she had intended to file the PFR on Friday, April 4, 2008, but she was on work-related travel that day and only realized at some time after 6 p.m. that she had lost the thumb drive on which the petition was electronically stored. PFR File, Tab 6 at 5. She was able to retrieve an earlier draft of the petition that evening from her e-mail account but was unable to complete work on the document. *Id.* at 6. She chose not to file a further request for an extension of time on April 4, however, but "waited until Monday, April 7, 2008 to confer with the board about her dilemma." *Id.* She explains her decision, stating that "a second extension was not the most practicable action to take based on the circumstances. First, requesting an extension at the last hour would seem suspect, so she believe [sic] it would be best to avoid that suspicion." *Id.* at 9. Upon contacting the Board on Monday, April 7, she filed a request for another extension of time. *Id.* at 6-7. She then explains that her workload and a weekend of Army Reserve commitments prevented her from recreating and submitting the PFR until April 27. *Id.* at 7-8.

¶6 The agency's representative has not shown that she exercised due diligence or ordinary prudence under the circumstances. The ID clearly explained the PFR

procedures and deadline, as did the Board's order extending the deadline. The agency's representative, having already successfully filed an extension request, concedes that she was aware of the April 4 deadline, that she realized on the evening of April 4, that she could not meet it due to the loss of a thumb drive, but that she chose not to take the simple step of requesting a further extension based upon her unusual circumstances. While her predicament may have been unfortunate, her failure to follow the Board's instructions constitutes failure to exercise due diligence and ordinary prudence. *See McNevin v. Department of the Air Force*, 77 M.S.P.R. 108, 112 (1997). The agency's petition was 23 days untimely; such a delay is not minimal and not a basis for waiving the filing deadline. *See Jasper v. U.S. Postal Service*, 88 M.S.P.R. 27, ¶ 6 (2001). The reason given by the agency's representative for the 23-day delay, that she had other work commitments, does not demonstrate good cause. *See McNevin*, 77 M.S.P.R. at 112. Accordingly, we dismiss the agency's PFR as untimely filed.*

ORDER

¶7 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective February 1, 2007. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶8 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the

* Because we dismiss the agency's PFR as untimely filed with no good cause shown for the delay, we find it unnecessary to address the appellant's motion to dismiss the agency's PFR on the grounds that the agency failed to provide interim relief.

Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶9 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶10 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶11 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at <http://www.mspb.gov/mspbdecisionspage.html>.

¶12 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision remains the final decision of the Board with regard to the merits of this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439


The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

	<p style="text-align: center;">DFAS CHECKLIST</p> <p style="text-align: center;">INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD</p>
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AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

**CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL
OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:**

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.